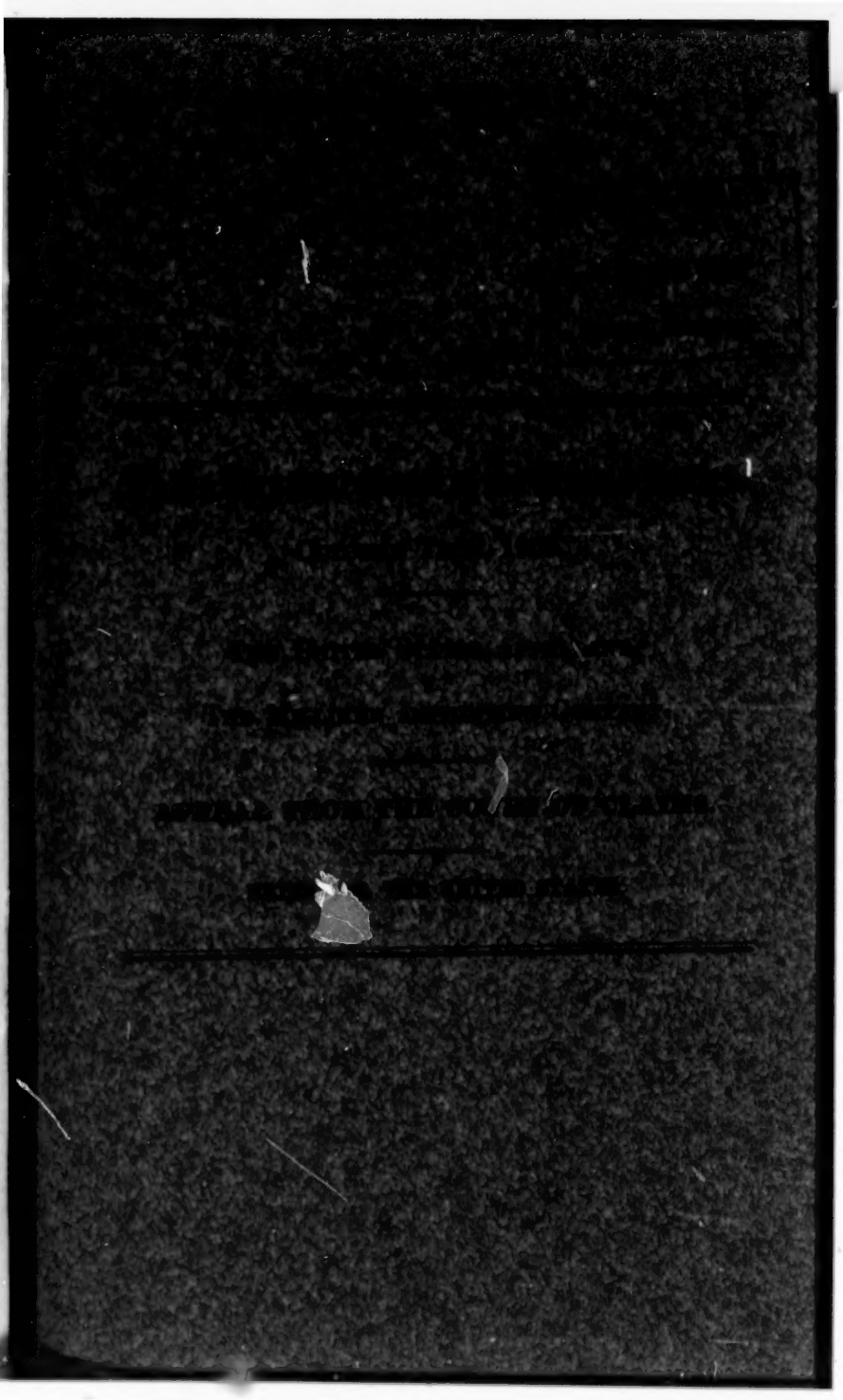

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,
v.
THE MILLIKEN IMPRINTING COMPANY. } No. 227.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The claimant alleged in its original petition that, pursuant to the act of March 3, 1899, which authorized the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to let contracts for the imprinting of revenue stamps, said contracts to be awarded under such terms, restrictions and regulations as might be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, prescribed certain terms, restrictions and regulations which were to be included

in and made a part of said contract, which were more fully set forth and contained in a preliminary contract entered into by and between claimant and the United States. This alleged preliminary contract was made Exhibit A of the petition and appears on page 3 of the record.

This allegation was afterwards amended by adding thereto the statement that the claimant accepted in writing the "terms, restrictions, and regulations" contained in said Exhibit A, in a letter which was made Exhibit D of the petition and is found on pages 8 and 9 of the record; that at the date of said alleged preliminary contract it was engaged in imprinting revenue stamps under contract with the United States, and that on the 25th day of May, 1899, a contract was awarded to the claimant by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, for the imprinting of stamps. The contract was set forth in full in Exhibit B of the petition and appears on pages 3–6 of the record.

This allegation was afterwards amended by adding thereto that this contract was subsequently executed for a valuable consideration and accepted by the claimant without examination or reading, upon the assurance by a representative of the United States that it contained all the provisions of the alleged preliminary contract (Rec., p. 7).

That by accident and mistake mutual to both parties thereto, and admitted, the said contract did not conform to the terms of their agreement, nor

the intentions of the parties, in that it omitted to state that "no application for contract to imprint stamps for period named will be considered of any person, firm, or corporation not engaged in imprinting stamps on the 25th day of April, 1899, under contract with the Government."

And further that it omitted to state that applications for said contracts shall not be received by the Commissioner of Internal Revenue after 12 m. on the 25th day of May, 1899.

That several weeks after the said 25th day of May, and in violation of said contract, the United States received from and granted an application for a similar contract to the American Imprinting Company, a corporation not engaged in imprinting stamps under contract with the United States on the 25th day of April, 1899.

That the said American Imprinting Company became composed of persons engaged in the stationery business, and who required the imprinting of a very large number of stamps on bank checks, etc. That on May 25, 1899, and for a long period prior thereto, the larger number of those constituting the said American Imprinting Company had required this aforesaid business to be done by the claimant, with which they were in every way satisfied, and which they would have continued had it not been for the contract granted to them as aforesaid by the United States, in violation of its contract with the claimant, to the damage of the claimant, as set forth in its amended petition, $21,084.99.

Upon these allegations in its petition the claimant prayed judgment against the United States: "That said contract be reformed so as to express the actual agreement and intentions of the parties thereto, by adding and making a part thereof the following words: 'And it is further agreed by and between the parties hereto that the party of the first part shall not receive, consider, or grant, and has not received, considered, or granted any application for similar contract to imprint stamps as hereinbefore described and provided from any person, firm, or corporation which is not actually engaged in imprinting stamps under contract with the party of the first part on the 25th day of April, 1899.'"

Following this was the prayer for judgment as follows:

> And your petitioner further prays judgment against the United States in the sum of twenty-one thousand and eighty-four dollars and ninety-nine cents ($21,084.99) damages for breach of said contract as reformed, and for such other and further relief as it may be entitled to. (Amended petition, Rec., p. 8.)

THE EVIDENCE.

As the Court of Claims assumed equity jurisdiction in the case it made no findings of fact, and accordingly the following synopsis of the evidence as it appears in the record, is presented:

EVIDENCE FOR CLAIMANT.

David Milliken, who is also claimant's counsel, testified that his occupation is attorney at law, his place

of residence city of New York, and that he is president of the claimant corporation; and further as follows:

Claimant performed the work of printing revenue stamps on bank checks for the United States under contract for a period of one year expiring July 1, 1899. During the continuance of that contract there was considerable dissatisfaction on the part of the users of stamps and the contractors, growing out of a lack of uniformity of price to be charged by the contractors for the work done. After the claimant had received the letter of the Commissioner of Internal Revenue dated April 25, 1899 (Exhibit A of petition), on or about the 25th day of May, 1899, he had an interview with the Commissioner of Internal Revenue at Washington, in which he delivered the acceptance of the contract, which is Exhibit D of the petition. At this interview the Commissioner asked him if he was going to make application for renewal of his contract, and he answered yes, but not until 12 o'clock, the time for closing; that he did not want to take the chance of any applications being put in by persons who did not have a contract on the 25th day of April, 1899.

This statement of what was said by the Commissioner was objected to on behalf of counsel for the United States as inadmissible and incompetent, on the ground that said Commissioner was now deceased.

Witness continued that he was then informed by the Commissioner that his application was accepted and his contract would be renewed; that he then called upon Mr. Johnson, chief of the stamp division, and informed him that his contract had been renewed.

Mr. Johnson then delivered to him two copies in blank of the contract to be executed; whereupon he said, "I presume the only changes from the other contract are those contained in the letter or communication dated April 25, 1899?" And Mr. Johnson said, "That is all." He then took the contracts away to New York, and afterwards executed them without reading them and returned them to the Commissioner of Interal Revenue. Very shortly after this, and before the 1st day of July, 1899, he was informed that a contract to do the same work had been granted to the American Imprinting Company.

Knowing that this company had no contract to print stamps on the 25th day of April, 1899, and had not made an application for a contract prior to noon on the 25th day of May, 1899, he looked up his contract, and then for the first time discovered that it failed to state that no application would be received from any person who did not have a contract on the 25th day of April, 1899, and did not state that no application would be received after 12 o'clock on the 25th day of May, 1899. He at once went to Washington and had an interview with Mr. Gage, Secretary of the Treasury. He mentioned to Mr. Gage that the contract to the American Imprinting Company was in violation of the agreement with him, and showed to him at that time the communication dated April 25, 1899. Mr. Gage then admitted that that was the agreement, and stated that the contract to the American Imprinting Company had been granted through inadvertence. Mr. Gage evaded the request to revoke that contract, for

the reason that the Commissioner of Internal Revenue was absent from the city, but stated that should it be violated in any way he would revoke it at once.

This testimony of statements made by Secretary Gage was taken under and subject to the objection that the same was incompetent and inadmissible.

The witness continued that subsequently, upon his own investigation, the Secretary of the Treasury revoked the contract with the American Imprinting Company, but this revocation was afterwards rescinded and they were permitted to continue their work.

The American Imprinting Company was composed entirely of persons, firms, or corporations who were having their stamps imprinted by the claimant to the satisfaction of the said firms.

Afterwards and frequently he had interviews with the Secretary of the Treasury, who at all times freely and frankly admitted that the contract with the American Imprinting Company was in violation of the contract made with the claimant.

This last statement was objected to on the grounds that it was incompetent and inadmissible.

Witness continued that he had had several interviews with Mr. Johnson, who told him that he was familiar with the formulation of the terms and conditions contained in the letter of April 25, 1899; that it was the intention of the United States to make the contracts in such a way that the contractors could make a profit out of the work; that they decided to fix a uniform price of eighty cents a thousand, so that

all persons using the stamps could derive the same benefit from them, or, in other words, to prevent advantage being given to one person over another, and with this in view it had been decided to restrict the contracts to those who had them and not to receive applications after the 25th day of May, 1899. During the operation of the claimant's contract it made a net profit in its business of about $4,000, and could have performed the amount of work that it claimed to have lost by the wrongful act of the defendant with only the added expense of incidental expenditures.

On cross-examination he testified that the contract of the claimant referred to by him was on a printed blank; that the prior contract referred to by him was not the contract of the claimant corporation, but the contract of David Milliken, jr., & Co., of New York, a partnership composed of himself and two others. In this prior contract the provision for salaries of the agent and counter was $2,500 per annum, instead of $3,400, as provided for in the contract of the claimant, and there was also a different provision as to the compensation in the two contracts. These proposed changes he had known of from the letter of the Commissioner of Internal Revenue of April 25, 1899. These changes as to the compensation for imprinting stamps and as to the increase of the salaries of the Government agents were matters in which he felt a pecuniary interest. When he wrote his letter of acceptance of the Commissioner he signed it David Milliken, jr., & Co., that being the partnership then under contract

with the Government, but the contract, nevertheless, was not made by this partnership, but by the Milliken Imprinting Company, a corporation, which corporation had not been a prior contractor.

Thereupon followed these questions and answers:

Cross-question. In this letter of application or acceptance that I have just referred to, signed by David Milliken, jr., & Co., to the Commissioner of Internal Revenue, dated May 25, 1899, attention was called particularly to the salaries to be paid and the compensation to be received for the imprinting. No reference was made in that communication, by specific mention, to the statements made in the Commissioner's letter regarding the time for receiving applications, nor to the fact that such communication recited that "no application for contract to imprint stamps for period named would be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government." That is so, is it not?

Answer. That is so. It speaks for itself.

Cross-question. And is that so because you did not consider it necessary to refer to that?

Answer. I did not consider it relating directly to the subject-matter of the contract. I considered it in my mind in making the application.

Cross-question. I did not ask that.

Answer. I had considered it.

Cross-question. My question relates to the omission to refer to those matters in your letter.

Answer. Yes; it speaks for itself.

Cross-question. And you say, as I understand you, "I did not consider it relating directly to the subject-matter of the contract?"

Answer. Yes.

He received the contract in duplicate, but did not at the time look to see whether it contained the new provisions as to compensation, nor the new provision for $900 more salary to the Government agents. He did not read the contract at all. The reason for this was that he had been assured by Mr. Johnson that the contract contained these changed provisions, and this although Mr. Johnson might be mistaken about that. When he signed the contract he signed it for the Milliken Imprinting Company, of which he was one of the members, and at the time he knew nothing about the new contract except what Mr. Johnson had told him. It might have been a contract for only one cent a thousand, or that the company was to pay $50,000 to the Government, for all that he knew, and he did not, even in the interests of his associates in the corporation, take the pains to ascertain whether Johnson was correct in his understanding of the contract or not. The Milliken Imprinting Company made three or four thousand dollars on their contract. The David Milliken Company on the preceding contract lost considerable money because, under the first contract, there was a cutting in prices which amounted to cut-throat business. The Milliken Imprinting Company was identical as to the persons who composed

it with the partnership of David Milliken, jr., & Co. Mr. Johnson, in his conversation regarding the provisions of the second contract, made no specific reference to anything. (Rec., pp. 42–50.)

On being recalled on behalf of the claimant, Mr. Milliken said:

> I desire to correct my testimony on page 12, where it appears that it was after I received the contract in duplicate that I did not consider that the omitted provisions related directly to the subject-matter of the contract. What I meant was that it was at the time I made application for the contract. In my letter of acceptance, as it appears, it was made in accordance with a circular letter of April 25, 1899, and the matters specifically mentioned by me were only those which I claim I was obligated to do. (Rec., pp. 9–10.)

There was only one competitor of the claimant in the city of New York, which was the Franklin Lee Bank Note Company.

The claimant's plant consisted of four large double presses, one small press, and one pony press. During the entire year, from July 1, 1899, to July 1, 1900, two of the larger presses were idle all the time, and one of the small ones was only occasionally in use. To have done the amount of business which claimant claims it lost by reason of the contract to the American Imprinting Company would have involved the additional expense of $2,285.

The total amount of business which the claimant claims was lost to it by reason of the contract to the

American Imprinting Company was 28,537,509 stamps which, at 80 cents per thousand, the contract price, made claimant's loss in money $22,869.99, from which is to be deducted the sum of $2,285, which would have been the expense of doing that additional amount of work, leaving the sum of $20,584.99 as the amount of claimant's damages from loss of business.

In addition, claimant provided an additional press to meet the requirements of increase of business, at a cost of $700, which became useless and was disposed of for $200, thus making the total damages claimed by claimant $21,084.99, after allowing all just credits and offsets.

The contract entered into by the claimant with the defendant was with the approval of the Secretary of the Treasury, and the restrictions of the contract to those who had them and the limitation of time within which application should be made, constituted the principal inducement to the claimant to make its contract.

Then follows: "I desire to correct my testimony on page 12, where I say I did not make reference in my letter of acceptance to the restriction of the contracts because I did not consider it related directly to the subject-matter of the contract. That I did not mean, for I always considered the restriction as bearing so directly upon the contract that I would not have made it without it. My conduct has always been consistent upon that point, and from the first knowledge of the defendants' disregard of it, and ever since,

I have claimed it to be a violation of the contract. * * * What I mean is that the time when I considered that the restrictions did not relate to the subject-matter of the contract was when I made the application for the contract, and not when I received the contract in duplicate." The object in making the increase in the salaries of the Government agents, as he understood it, was to deter many from seeking a new contract. That is, the Government, as you understand it, "thought that the practical result of requiring the proposed new contractors to pay for an additional counter, would result in deterring many from asking a new contract." (Rec., pp. 11-14.)

DEPOSITION OF JOHN H. STEWART.

I am a member of the firm of Stewart, Warren & Co., manufacturing stationers in New York City. We formerly employed the firm of David Milliken, jr., & Co., to imprint revenue stamps on the checks which we furnished our customers. This work they performed satisfactorily up to July, 1899. Our firm became a member of the American Imprinting Company, and was one of the organizers of it, and thereafter we had our stamps imprinted by the latter company. If it had not been for our contract with the American Imprinting Company we would have continued to send our work to the Milliken Imprinting Company. The total number of stamps imprinted by us during the year July 1, 1899, to July 1, 1900, was 9,278,207. When we sent our work to Milliken & Co. it was because we were dissatisfied with the work

done by the Franklin Lee Bank Note Company. The object of the American Imprinting Company was to do work for the members of that company and any one else who chose to give their work to the company.

Cross-examination. The imprinting of stamps in the course of our business by the American Imprinting Company cost us less than if we had had the same work done by the Milliken Imprinting Company, because we shared in the profits of the business of the American Imprinting Company. Each one of the stockholders of the American Imprinting Company of course transferred to the company all of their business, and it was to the interest of all of us to get customers for the American Imprinting Company. During the same year we had 21,202 stamps printed by the Milliken Imprinting Company for customers who directed that it be done by that company. The amount that we paid for the printing of our stamps by the American Imprinting Company was 80 cents per thousand, the uniform rate fixed by the Government. (Rec., pp. 14–19.)

DEPOSITION OF HERSEY BROWN.

I am a member of the firm of Brown, Lent & Pett, manufacturing stationers, of New York City. Our work of imprinting revenue stamps was done prior to July 1, 1899, by David Milliken, jr., & Co.—that is, the largest part of it. We sent some during that time to the Franklin Lee Company. After we had begun business with David Milliken, jr., & Co., we sent it all

to them and were entirely satisfied with their work. After the formation of the American Imprinting Company, of which our firm was a member, we had our imprinting done by that firm, because we shared in the profits of imprinting the stamps. It would be impossible to tell exactly whether if it had not been for our contract with the American Imprinting Company we would have continued to send our work to the Milliken Imprinting Company, but the conditions being the same as they had been the year before we would have been likely to do so. The American Imprinting Company imprinted for us 2,721,859 stamps.

Cross-examination. We paid the American Imprinting Company the regular price for imprinting stamps, but got dividends from that company out of the profits. It was to the interest of our firm to increase the business of the American Imprinting Company. We got our customers from banks all over the country, and the more we increased the business of the American Imprinting Company the more money we would make. This was not the case during our arrangement with David Milliken, jr., & Co. (Rec., pp. 20–22.)

DEPOSITION OF WILLIAM E. BADEAU.

I am the manager for J. H. Warner, manufacturing stationer, of New York. Our imprinting of revenue stamps was done prior to July 1, 1899, by David Milliken, jr., & Co. It was done satisfactorily. We transferred this business on the organization of the

American Imprinting Company to that company, because we were one of the stockholders of the American Imprinting Company. If it had not been for our contract with the American Imprinting Company we would have continued to send our business to the Milliken Imprinting Company, if the work had continued to be satisfactory. The American Imprinting Company printed 3,663,093 stamps for us.

Cross-examination. I was a stockholder of the American Imprinting Company for the benefit of our firm, for the purpose of securing benefits from it. There was profit in the business in the way of dividends on the stock, and it was therefore to our advantage to increase the business of the American Imprinting Company. In other words, we paid the regular price for printing stamps to the American Imprinting Company and received some of it back in profits. We could have had as good work done by the Franklin Lee Bank Note Company at the time that we were dealing with the Milliken Imprinting Company, but we preferred the latter company because the Franklin Lee Bank Note Company was a rival of ours in the stationery business. (Rec., pp. 23–28.)

DEPOSITION OF RALPH BALMER.

I am the manager of the corporation, Styles & Cash, manufacturing stationers, of New York City. Prior to July 1, 1899, for the first four months our imprinting of stamps was done by the Franklin Lee Bank Note Company. After that it was done by

David Milliken, jr., & Co., in a satisfactory way. After July 1, 1899, the American Imprinting Company did our printing of stamps. If we had not had it done by them we would have continued to have it done by the Milliken Imprinting Company. The American Imprinting Company printed for us 2,219,350 stamps from July 1, 1899, to July 1, 1900. Both Styles and Cash were stockholders in the American Imprinting Company and it was to their advantage to increase the business of the American Imprinting Company. I do not know why we left the Franklin Lee Bank Note Company to go to the David Milliken, jr., & Co. The character of the work done by each of those companies was satisfactory, except that the Franklin Lee Bank Note Company were slow. And this was one of the reasons that I gave to the firm for changing to the Milliken Imprinting Company, but ultimately why it was changed I can not say, because I did not change it myself. (Rec., pp. 28–31.)

DEPOSITION OF CHARLES H. MANN.

I am president of the William Mann Company, stationesr, etc. Prior to July 1, 1899, our imprinting of stamps was done by the Franklin Lee Bank Note Company. When the American Imprinting Company was formed I was a stockholder and subsequently became its president. It was composed strictly of New York, Philadelphia, and Baltimore stationers and printers. After it was formed we gave them almost all our work after the 1st of July. If it had not been for our contract with the Amer-

ican Imprinting Company we would have sent all our work, with the exception of a very little of it which we did in Philadelphia, to the Milliken Imprinting Company, and would not have continued our work with the Franklin Lee Bank Note Company because they were competitors in our line of business. The amount of stamps done by the American Imprinting Company was in the neighborhood of 5,700,000 in Philadelphia and 12,000 to 13,000 in New York.

Cross-examination. It was to my advantage to have the William Mann Company do as much as possible with the American Imprinting Company because I shared in the profits of the latter company. We never did any business with the Milliken Imprinting Company, except that our New York branch had work done by the Milliken Imprinting Company after the American Imprinting Company was formed. This was through instructions from our customers; otherwise it would have gone into the American Imprinting Company. The William Mann Company had a great many customers, and except where specially otherwise directed I placed their printing business with the American Imprinting Company, unless we had instructions to the contrary, and with the exception of stamps imprinted for us by the Pennsylvania Publishing Company in Philadelphia, which we gave them to keep them in good humor. I look upon the Franklin Lee Bank Note Company as our competitors and I also ascertained that they had various prices for imprinting revenue stamps. This was prior to July 1, 1899. Our business of imprinting

stamps was much larger the second year than the first year. (Rec., pp. 31–38.)

DEPOSITION OF SAMUEL WILLIAMS.

I am president of the Milton C. Johnson Company, manufacturing stationers of New York City. Prior to July 1, 1899, the Milliken Imprinting Company did the most of our imprinting of stamps. After July 28, 1898, they did it all until the organization of the American Imprinting Company and did it satisfactorily, except that there were occasional delays in deliveries, but not serious delays. We were stockholders in the American Imprinting Company, and transferred our business of imprinting stamps to that company, deriving a profit from its business. If it had not been for the organization of the American Imprinting Company I presume that we would have continued to send our work of imprinting stamps to the Milliken Imprinting Company. The amount of business done by the American Imprinting Company for us was at least 5,000,000 stamps.

Cross-examination. I was a director in the American Imprinting Company and it was to our advantage to increase the business of the American Imprinting Company. There were some objections made to the work of the David Milliken, jr., & Co. on account of delays and perhaps some other objections, but practically the work was perfectly satisfactory. The directors of the American Imprinting Company went into the business to some extent of getting out-

side parties to send them their work. The Franklin Lee Bank Note Company performed work satisfactory for us, except that it was not always turned out promptly. (Rec., pp. 38–42.)

EVIDENCE FOR DEFENDANTS.

ELLIS C. JOHNSON.

I am chief of the stamp division, Internal-Revenue Bureau, Treasury Department. Have held this position about seven years. I held it at the time that the contract of June 19, 1899, referred to in claimant's petition, was executed, and am perfectly familiar with the contents of that contract. I prepared the original contracts in 1898. Consequently when we were desirous of reducing the number of contractors, in making the matter of imprinting internal-revenue stamps uniform throughout the United States, by the contractors, the changes in the contract were made. It was just prior to July 1, 1899, when the contracts were printed. Then the contracts were filled up by the Commissioner, omitting the signatures, and forwarded to the several parties who had signified their willingness to sign the contracts for the next year.

The printed text of the former contracts was practically preserved, except in so far as it differed from the new provisions which had been agreed upon in the Commissioner's office as to compensation for imprinting and the salaries to be paid by the contractors. There were about twenty-five or thirty new contracts made and the blanks were

prepared precisely alike for all these new contracts. After they had been prepared they were presented to the attention of the Commissioner of Internal Revenue, who signed them afterwards. I do not know whether or not he read them, but I think he did. I went over the matter with him and conferred about the terms and conditions, as I did about official business of that importance at all times.

In preparing these contracts no reference was made in any way to the fact stated in the circular letter to the contractors, of April 25, 1899, of the Commissioner of Internal Revenue, that applications would not be received except from present contractors, nor was any reference made to the statement therein contained that each application mu t be accompanied with a guarantee of at least two responsible persons, and that in case the contract was entered into an acceptable bond must be furnished in the sum of $25,000 for the faithful performance thereof, nor was any reference made to the statement therein contained that applications would be received at the office of the Commissioner of Internal Revenue until 12 m. May 25, 1899. These matters were not omitted from that contract by mistake on my part. So far as I know there was no intention on the part of the Bureau of Internal Revenue or of the Treasury Department to include any of those provisions in these contracts.

I remember several conversations with Mr. Milliken about contracts and the method of doing the business, but I have no distinct recollection of the

specific matter alleged being discussed in the conversation Mr. Milliken has referred to. I made no statement in regard to the contents of this second contract by which I intended to have him rely upon that statement as to such contents solely. I at no time made any statement to him in regard to the contents of this intended contract which I intended he should rely on to the exclusion of his finding out himself what was in the contract. If he is correct in his recollection that he asked me if the contract contained the changes referred to in the circular letter and I stated that it did and that was the only change, I had no intention of assuring him that the contract contained statements as to the date when applications would be received and that contracts would be let only to present contractors. As a matter of fact, it did not contain any such statements.

Cross-examination. The Commissioner of Internal Revenue and myself agreed to the changes in these contracts. I had several conversations with the Commissioner prior to the issuing of the communication dated April 25. It was our intention when the letter was written to restrict the contracts to those who had them on that date and not to receive applications after 12 o'clock on the 25th day of May, and the purpose of the letter was that those who had existing contracts were the only ones who should have a renewal of their contracts.

Cross-question. Now, at the interview that I mentioned that I had with you regarding the contents of the contract, there was no intention on my part

to mean or say that you misled me in any way at all, but the question put by Mr. Pradt rather assumed that. Do you recall any conversation that I had with you about that time, on the 25th day of May, after my contract had been awarded to me; or let me put it this way: Do you recall any conversation, as I have related, in which I stated or I had asked you if the new contracts contained anything but the changes provided for or mentioned in the letter of April 25? Do you recall any such conversation as that?

Answer. I recollect a number of conversations you had with me at different times affecting this contract and this work, but I don't recollect any conversation in which the language used by you or the answer assumed by me was made or given.

Cross-question. Are you prepared to state that no such conversation may not have been had?

Answer. I am not.

After I drew up the blank form of contract I presented it to the Commissioner of Internal Revenue before execution. I do not recall whether he actually read the contract. I was impressed with the idea that he did. He was a careful man and usually in matters of that kind would run over matters with me or by his comparing it or reading it himself. He left the drafting of the contract to me. The American Imprinting Company was not printing stamps under contract with the Government on the 25th day of April, 1899.

Redirect examination. At the time of the conversation that I had with Mr. Milliken, that he has referred to, I was not authorized in any way by virtue of the duties of my official position to make statements to intending contractors as to what the contract they were going to sign contained, for the purpose of having them rely solely upon what my understanding of the contents of those contracts was. I had no intention of assuming to do anything of that sort. It was the custom of the Commissioner to read over important papers which he had to sign. The number of these new contracts was about 25, and the blanks were all alike. All that was necessary was to read one only in order to know the provisions that they would all have. The business was a very important business. It was considered in the office an important matter to have this compensation for imprinting made uniform throughout the United States, and the contracts provided for that, which the old ones did not. It was considered a matter of some importance to have the salaries to be paid by the contractors to the Government employees increased. It gave additional supervision. Those matters had been discussed in the office of the Commissioner of Internal Revenue, by the Commissioner, among others, prior to issuing that letter of April 25, and I submitted to him the contract containing these two new and important provisions.

Recross-examination. The object of restricting the new contracts to those that had them on the 25th

day of April was to prevent the increase in the number of contracts as much as anything else. There might have been some other purpose. It was to prevent discrimination among those who were imprinting stamps and make the instrument upon which they were imprinted and concealing the price of that in the manufacture of the instrument itself. In other words, it was done for the purpose of preventing the constant annoyance and criticism that the office and Department were subjected to on account of the manner in which some of the contractors were doing business. To overcome that it was determined to fix the price and compel them to adhere to it, in the interest of good service and the prevention of any cause of criticism by the taxpayers throughout the country. The additional counter was added to each contract primarily to increase the expense so that the business would be reduced within legitimate bounds. On the other hand, it was urged that some large imprinting establishments had not sufficient supervision by one counter and it was to assist them along. I think it had been considered by all as important. It was done for the purpose of reducing the number of contracts. (Rec., pp. 50–56.)

THE FACTS.

The following is deemed to be a fair summary of the material facts in this case as shown by the record:

The claimant entered into a contract with the Commissioner of Internal Revenue to imprint internal-revenue stamps for the year beginning July 1,

1899. During the previous year a partnership, composed of the stockholders of the claimant corporation, had a contract for imprinting such stamps. On the 25th day of April, 1899, the Commissioner of Internal Revenue issued a circular letter to the various contractors for imprinting internal-revenue stamps, informing them that changes would be made in the new contracts in the matter of prices and cost of supervision; that applications for new contracts would not be considered from any person, firm, or corporation not then engaged in imprinting stamps under contract with the Government; that each application for a contract must be accompanied by a guaranty that in case a contract was entered into a bond would be furnished for the faithful performance thereof; that the Commissioner reserved the right to reject any and all applications and cancel any contract wherever and whenever it should appear to the interests of the public and the Government to do so; that applications would be received at his office until noon, May 25, 1899. Subsequently blanks were prepared for the new contracts, after careful consideration in the office of the Commissioner of Internal Revenue by that officer, and contained the new provisions as to the amount to be paid by contractors for expenses of supervision and as to compensation for imprinting, the latter change being made, as stated in said circular letter, to secure absolute uniformity in prices charged, while the first change, it was thought, would tend to reduce the number of new contracts.

On the 25th of May, 1899, the firm of David Milliken, jr., & Co., made written application to the Commissioner of Internal Revenue for a contract for imprinting stamps, in accordance with his circular of April 25, 1899, specifying in said application the new provisions set forth in said circular as to salaries for supervision and as to compensation for the work. This application was granted by the Commissioner of Internal Revenue, but the contract was executed by the claimant corporation instead of the partnership firm, and as so executed was accepted and entered into by said Commissioner. The contract was signed by the Commissioner with full and careful knowledge of its contents and of the changes made in the same from the old contract, which changes were all that had been intended or contemplated by him. But the president of the claimant, who represented the claimant in the matter, signed the contract on behalf of the claimant without reading it, and with no other knowledge of its contents than such as he had gathered from a conversation with Mr. E. C. Johnson, the chief of the stamp division in the office of the Commissioner of Internal Revenue, from which conversation he drew the conclusion that the contract contained not only the changes which he had specifically mentioned in his application for David Milliken, jr., & Co., but also provisions that no contracts for imprinting stamps during that year would be made with others than those holding contracts during the prior year, and that applications for contracts would be received

by the Commissioner only until noon of May 25, 1899. The official with whom he had this conversation had no intention of making any statement regarding the contract upon which the representative of the claimant should rely, and was not authorized to make any such statement; nor was there any warrant upon the part of the representative of the claimant for assuming that that official had any such authority. That official was not a party to the contract. Furthermore, he did not have in mind at the time any reference to the particular matters which the representative of the claimant says were in his mind, but solely to the changes which had actually been made in the new contract, the draft of which new contract had been prepared by him at the request of the Commissioner. This representative of the claimant, however, now states that he understood from the letter of the Commissioner of April 25, 1899, and from his said conversation with Mr. Johnson, that it was intended that the new contract for the year 1900 should contain a provision that no contracts for imprinting revenue stamps would be made with any party not already holding a contract for such imprinting and that no application for any such contract would be received after May 25, 1899; and that he discovered that it did not contain those provisions upon reading it for the first time after a similar contract had been made by the Commissioner with the American Imprinting Company. The claimant made a profit on its business of about $4,000, whereas under the contract for the preceding year the firm of

David Milliken, jr., & Co. operated at a loss. This result was brought about largely through the uniformity in prices for imprinting stamps provided for in the new contract. But the claimant contends that its profit would have been much larger had it not been for the fact that the Commissioner of Internal Revenue, subsequent to the execution of its contract, entered into a similar contract with the American Imprinting Company, another corporation in New York City, which corporation was composed largely of its former customers, and performed the work of imprinting stamps which otherwise it contends would probably very largely have been given to the claimant.

CLAIMANT'S PETITION.

Upon this state of facts the claimant prayed the Court of Claims to re-form its contract with the Commissioner by adding to the same the provisions omitted, as it alleged, by mutual mistake, and to give it judgment because of alleged breach by the United States of the contract as so re-formed, through entering into the contract with the American Imprinting Company, in the amount of the profits which it claimed to have lost thereby.

The Court of Claims granted the prayer for reformation of the contract and entered a decree to that effect as follows:

> The Court, upon the evidence and the question of law involved, hereby adjudges and decrees that the contract dated on the 29th

[19th] day of June, 1904, be so re-formed as to embrace the substance of Exhibit A, of the petition filed herein, which is in the words following, to wit:

"No application for contract to imprint stamps for period named to be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government," and that the same be and is considered by the Court as forming a part of the contract in the determination of the question of claimants' right to recover; and upon a full consideration of the case with such re-formation,

It is hereby adjudged and decreed that the claimant recover from the defendant the sum of $21,084.99, its damages for the violation of said contract so re-formed. (Rec. p. 69.)

ASSIGNMENTS OF ERROR.

The appellant makes the following assignments of error:

First. The court erred in taking jurisdiction of the case and in not dismissing the same for want of jurisdiction.

Second. The court erred in re-forming the contract between the claimant and the United States set forth in Exhibit B of claimant's petition.

Third. The court erred in rendering judgment for the claimant in any amount whatsoever.

ARGUMENT.

EQUITY JURISDICTION OF THE COURT OF CLAIMS.

Under the statutes conferring and defining the jurisdiction of the Court of Claims, the claimant has heretofore been required by the court to present in his petition a claim founded on contract upon which a money judgment only was demanded. This case is a notable and practically the sole exception to this established rule. In this case the claimant asserted no claim arising out of any existing contract and did not in the first instance ask for a money judgment. On the contrary its petition invoked at the outset the exercise by the court of equity jurisdiction only, and the primary judgment prayed by it was a purely equitable decree of re-formation of a contract between it and the United States. And the court was asked to thus sit and act as a court of equity on the ground that by so doing there would be made to appear a claim for money damages arising out of the contract as re-formed by the court, for which a money judgment was secondarily asked.

The Court of Claims exercised the equity jurisdiction thus invoked, basing such action upon the enacting clause of section 1 of the act of March 3, 1887 (24 Stat. L., 505), commonly known as the Tucker Act, it being conceded by the court that, prior to the passage of that act, it was without equity jurisdiction except when given by a special act of Congress. (Rec., p. 61.) This concession is in accordance with the decisions of this court in *Harvey* v. *United States*, 105 U. S., 679, and *Jones* v. *United States*, 131 U. S., 1.

Thus the first question to be decided on this appeal is whether the Tucker Act confers upon the Court of Claims the equity jurisdiction necessary to entertain an action brought for the re-formation of a contract and to enter a decree of such re-formation, because there is joined in such action a demand for a money judgment alleged to arise upon the contract if re-formed as prayed for.

Although the claimant coupled with its prayer for equitable relief a demand for a money judgment, the fact remains that its petition is primarily addressed to the Court of Claims as a court of equity pure and simple.

> A suit in equity is the only known remedy for the re-formation of a written contract. (*Stockbridge Iron Co.* v. *Hudson Iron Co.*, 102 Mass., 48; Pomeroy's Eq. Jur., sec. 188.)

When, therefore, the claimant prayed the Court of Claims to re-form its contract with the United States, it sought to enter the court as a court of equity and not as a court of law. Indeed it could enter the court in no other way, for confessedly it had no claim against the United States under its existing contract. In other words, unless the Court of Claims could first sit as a court of equity in the case and render a decree for the purely equitable relief prayed by the claimant, it had no jurisdiction at all of the action, since otherwise, and until such decree should be rendered, the claimant had no claim founded upon contract to assert.

In support of the decision of the Court of Claims on

this question of jurisdiction, reliance is placed upon the cases of *South Boston Iron Works* v. *United States* 34 C. Cl., 200, and *District of Columbia* v. *Elias E. Barnes*, 197 U. S. 146.

In the former case the Court of Claims held, as in this case, that it had equity jurisdiction under the Tucker Act to re-form a contract under circumstances similar to those in this case, but refused to re-form the contract on the evidence. From this decision the claimant did not, and the United States obviously could not, appeal. And as the decision was rendered without any discussion, it is clear that it sheds no light upon the question in this case that is not to be found in the decision here appealed from.

The decision of this court in the Barnes case was based upon the language of a special statute relating to certain claims against the District of Columbia, conferring upon the Court of Claims "original legal and equitable jurisdiction" of such claims, and the opinion of the court, delivered by Mr. Justice Day, in which it is held that the Court of Claims had jurisdiction in that case to re-form a contract, is expressly based upon that special jurisdictional statute. To be sure, reference is made in the same opinion to the decision of the Court of Claims in the South Boston Iron Company case, *supra*, and to the principle of law respecting claims arising out of equitable demands, recognized in this court in the case of the *United States* v. *Jones*, 131 U. S., 1, but nevertheless the decision of the court did not involve nor attempt to

determine the extent of the equity jurisdiction of the Court of Claims conferred by the Tucker Act. Hence, that question is now before this court for determination unless it has already been decided in the negative in the Jones case, above referred to.

In delivering the opinion of this court in that case Mr. Justice Bradley, after citing the case of *United States* v. *Alire*, 73 U. S., 6 Wall., 573, holding that under the jurisdictional acts of 1855 and 1863 the Court of Claims has power only to render judgment for money found due from the Government to the petitioner (p. 16), continues, with reference to the Tucker Act:

> It seems, therefore, that in the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands. We do not think that it was the intention of Congress to go further than this (p. 18).

This would seem to be determinative of the question of jurisdiction here raised. It is true that in this case there is coupled with the prayer for equitable relief a demand for a money judgment, but the claim upon which such money judgment might be entered has no present existence and can arise only through the equitable relief prayed for. Hence the Court of Claims was called upon by the petition and was obliged, to first sit as a court of equity and render a purely equitable decree in the case. But this is

exactly what it has no power to do, according to the Jones case. That is to say, whilst it has jurisdiction of a *claim for a money judgment arising out of the decree of a competent court of equity*, it has no power to *render such decree* in the first instance in order that it may afterwards proceed to consider the claim thus arising. In other words, its jurisdiction of a "claim for money arising out of an equitable demand" (Jones case, p. 18) does not extend to the equitable demand itself. It has power to interpret the dream but not to first tell the dream.

If the view taken by the Court of Claims is correct, then all that is necessary in order that it may sit and act as a court of equity is for a claimant to unite with a petition for equitable relief a demand, however slight, for a money judgment upon the claim to be thus created. So that in the Jones case if there had been asserted a claim for use and occupation by the United States of the land in question, the court would have had power to first decree the issuance of the patents as prayed for.

In brief, the United States contends that the Court of Claims, however able and qualified, is not in any sense a court of equity. Congress has frequently recognized this since the Tucker Act by special acts giving equity jurisdiction to the Court of Claims in a particular case.

THE ALLEGED MISTAKE.

The purpose of an action for reformation of a contract on the ground of mistake is not to interpret the

written contract, but to correct it so that it shall truly state the agreement of the parties. And since in such an action the court is simply called upon to declare the true and complete contract of the parties, which the written contract, through mistake, does not fully set forth, it is clear that the mistake alleged must be mutual. Such is the settled rule of law.

Alabama Midland Ry. Co. v. *Brown*, 98 Ala., p. 648.

Pomeroy's Eq. Jur., sec. 870 and sec. 1376.

> It is enough to authorize the reformation of a contract if it appears that, through the mistake of both parties to it, the intentions of neither have been expressed in it. (*Maher* v. *Hibernian Insurance Co.*, 67 N. Y., 290.)

EVIDENCE REQUIRED.

The evidence of this mutual mistake must be clear and convincing—"the strongest possible."

> Courts of equity do not grant the high remedy of reformation upon a probability nor upon a mere preponderance of evidence, but only upon a certainty of the error.
>
> *Pomeroy's Eq. Jur.*, sec. 850.
>
> *1 Story's Eq. Jur.*, sec. 152.
>
> *Phœnix Fire Ins. Co.* v. *Gurnee*, 1 Paige Chancery Rep., p. 279.
>
> *Newton* v. *Holley*, 6 Wis., 604.

The mistake, indeed, according to the current of authority, must be established beyond reasonable doubt.

Hearne v. *Marine Ins. Co.*, 20 Wall., 490.

Stockbridge Iron Co., supra, 102 Mass., p. 49.

Meade v. *West Chester Fire Ins. Co.*, 64 N. Y., 455.

See also authorities cited in 1 Story's Eq. Jur. (13th ed., 1886), p. 153.

> The power of courts of equity to reform written instruments is one in the exercise of which great caution should be observed. To justify the court in changing the language of the instrument sought to be reformed (except in case of fraud), it must be established that both parties agreed to something different from what is expressed in the writing, and the proof upon this point should be so clear and convincing as to leave no room for doubt. Losing sight of these cardinal principles in the administration of this peculiar remedy would lead to the assumption of a power which no court possesses, of making an agreement between parties to which they have not both assented.
>
> *Meade et al.* v. *West Chester Fire Insurance Co.*, (64 N. Y., 455.)

ABSOLUTE FAILURE OF PROOF OF MUTUAL MISTAKE.

In the present case, so far from there being any clear and convincing evidence of *mutual* mistake, there is an absolute failure of proof of any mistake whatever on the part of the Commissioner of Internal Revenue. So far as the Commissioner was concerned, the contract contained precisely what he intended it should contain, after deliberate consideration of the matter. The claimant relies upon the circular letter of the Commissioner (Exhibit A of the petition) and the claimant's "acceptance" (Exhibit D) as evi-

dence of the mistake, "*documentary and indisputable.*" The process of reasoning by which this contention is evolved is thus presented: The circular letter of the Commissioner was a complete proposition on the part of the Commissioner respecting the work of imprinting internal-revenue stamps for the Government, addressed only to parties then engaged in such work. This proposition was accepted by the claimant, and thereby a preliminary agreement was entered into between the parties, which constituted the real contract. Subsequently, however, by mutual mistake, portions of the contract thus entered into were omitted from the final written contract thereafter drawn up and executed by the parties.

This contention is without foundation in fact. To begin with, the circular letter of the Commissioner was not a *proposition* at all, but a *notification* to parties contemplating applications for contracts, and the reply of the claimant, or rather of the partnership which afterwards organized the claimant corporation, was not an *acceptance*, but an *application* for a contract. The evidence of Ellis C. Johnson, chief of the stamp division in the Bureau of Internal Revenue, shows that this circular letter of the Commissioner was drawn up and sent to the various parties then engaged in imprinting stamps for the Government as a result of the prior experience of that Office in the matter of the imprinting of revenue stamps for the Government by private parties, in consequence of which the Commissioner had determined to require absolute uniformity in the prices charged

by the various contractors for imprinting stamps and to endeavor to reduce the number of contractors by increasing the cost of supervision from $2,500 to $3,400 per annum; also to restrict the number of contractors to parties then engaged in the same work (Rec., p. 51). These conclusions were made known to the then contractors for imprinting stamps through the circular letter of the Commissioner dated April 25, 1899. The letter began with this paragraph:

> In awarding contracts for imprinting stamps on checks, drafts, and other instruments for the year commencing July first, 1899, it has been determined to add the following provisions to contracts in addition to those now contained in the existing contracts for imprinting stamps.

Following this was a statement of the additional provisions in the new contracts determined upon, relating to salaries for supervision and to compensation.

These proposed changes were specified in the two paragraphs immediately following the announcement of such changes. The language of these paragraphs is clear and unmistakable, pointing out with definiteness the changes to be made. (Ex. A., Rec., p. 3.)

The letter then went on to notify intending applicants that no application for contract to imprint stamps for the succeeding year would be considered from any party not then engaged in imprinting stamps under contract with the Government; that each application for contract must be accompanied by a guaranty; that in case a contract was entered into and accepted, a bond in the sum of $25,000 would be

required; that the Commissioner reserved the right to reject any or all applications, and to cancel any contract wherever and whenever it should appear to the interests of the public and the Government to do so; and that applications would be received at the office of the Commissioner until noon, May 25, 1899, giving directions as to the manner of formally presenting such applications.

The claimant now insists that it was the intention of this letter to notify applicants for contracts for imprinting stamps that the contracts for the succeeding year would contain the provision that no application for a contract would be considered from any party not then engaged in imprinting stamps under contract with the Government, and that applications for contracts would be received by the Commissioner until noon, May 25, 1899. It is perfectly evident, however, that there was no intention on the part of the Commissioner of adding to the new contracts *all* that was contained in this circular letter after the opening paragraph. Even claimant admits that this is so, as to its recitals regarding the guaranty to be furnished on application for a contract, the amount of the bond, that applications should be sealed, and regarding the manner in which they should be addressed to the Commissioner. Accordingly, it becomes necessary to examine the letter in order to determine what portions of it related to the proposed additional provisions in new contracts. There is no question, as already pointed out, that the two paragraphs following the opening paragraph relate to such

provisions, one of them providing for an increase of $900 in the cost of supervision to be paid the United States, and the other fixing absolutely uniform prices for the imprinting of stamps; but just as clearly no intention on the part of the Commissioner is expressed in this letter of a determination to incorporate into the new contracts a provision by which the United States should be absolutely bound for a year to let such contracts only to persons holding existing contracts, or barring himself from receiving applications after May 25, 1899. In other words, tying his own hands by an agreement fraught with possible mischief and prejudice to the interests of the Government, and, too, without any consideration. He had, to be sure, decided for the time being upon this course as a matter of policy, and gave notice of such conclusion to intending applicants for contracts in his circular, but to say that it was his purpose to enter into a binding contract to rigidly pursue this policy is simply preposterous. Indeed such an improvident agreement would undoubtedly have been void as against public policy—as an unauthorized attempt to bar the Government from the exercise of essential discretionary powers. The exigencies of the Government might, within the ensuing year demand twice as many private contractors as were then engaged in imprinting stamps. The work of the claimant in New York might prove so unsatisfactory as to make it absolutely essential to cancel its contract under the right reserved by the Commissioner so to do, with the resulting necessity of a

new contract with some other party in that city who had never before been engaged in such work. This is all plain common sense, and the claimant, or the claimant s predecessors, so recognized it in their application for a contract, dated May 25, 1899, wherein are specified simply the additional provisions recited in the Commissioner's circular letter relating to salaries and to compensation, but nothing else. (Ex. D., Rec. p. 8.) This matter was called, on cross-examination, to the attention of the president of the claimant, David Milliken, jr., who wrote the application above referred to, as follows:

> 33. Cross-question. In this letter of application or acceptance that I have just referred to, signed by David Milliken, jr., & Co., to the Commissioner of Internal Revenue, dated May 25, 1899, attention was called particularly to the salaries to be paid and the compensation to be received for the imprinting. No reference was made in that communication by specific ment on to the statements made in the Commissioner's letter regarding the time for receiving applications, nor to the fact that such communication recited that "no application for contract to imprint stamps for period named would be considered from any person, firm, or corporation not now engaged in imprinting stamps under contract with the Government." That is so, is it not?
>
> Answer. That is so. It speaks for itself.
>
> 34. Cross-question. And is that so because you did not consider it necessary to refer to that?

Answer. I did not consider it relating directly to the subject-matter of the contract. I considered it in my mind n making the application.

35. Cross-question. I did not ask that.

Answer. I had considered it.

36. Cross-question. My question relates to the omission to refer to those matters in your letter.

Answer. Yes; it speaks for itself.

37. Cross-question. And you say, as I understand you, "I did not consider it relating directly to the subject-matter of the contract?"

Answer. Yes. (Rec., pp. 46–47.)

Afterwards, to be sure, in a subsequent deposition, this same witness attempted correction of this testimony (Rec., pp. 9–11), but this correction is so clear y an afterthought that it does not seem to merit serious consideration.

Finally, it is only necessary to read the circular letter of the Commissioner and the reply thereto, which the claimant treats as an acceptance of a proposition, to see that the letter was in no sense a proposit on, but purely a notification, and that it committed the Commissioner :o nothing. On the contrary, intending applicants for contracts were explicitly informed in that letter that the Commissioner reserved the right to reject any and all applications. Indeed, the phrase "application for contract" in the letter alone conclusively disposes of the contention that it was a proposition which required only acceptance to become a contract.

The letter simply gave notice to the parties then engaged in imprinting stamps for the Government of certain additional provisions which the Government would require in such contracts; as to who would be allowed to bid for a contract; when such application should be made, and of the manner in which it must be made; but contained no assurance whatever that when the application was made, even in strict compliance with all these requirements, it would be accepted. It is perfectly apparent from the reply made in behalf of claimant that the situation was understood by the writer of such reply to be exactly as here stated, for instead of being in the nature of a bid or proposal, it is simply an application for a contract, making specific reference to the additional provisions which the Government would require in such contract, but not a word relating to the matters which the claimant now contends should have been incorporated in the contract, and which it now says were of *paramount* importance.

Further and conclusive evidence, if more were needed, of the additional provisions which the Commissioner of Internal Revenue had decided to incorporate into the new contracts for imprinting stamps is to be found in the fact that he caused to be drawn up by Mr. Johnson, chief of the stamp division in his office, the draft of the new contracts which was substantially the same as the old ones with the exception of an increase of $900 in the cost of supervision and a provision fixing uniform prices to be charged by all contractors for imprinting stamps. This was

done after conversation between the Commissioner and Mr. Johnson relative to the provisions of the new contract. (Rec., pp. 51 and 53.) After these blanks were prepared by Mr. Johnson they were submitted to the Commissioner, being about twenty-five in all. As they were identical, it was necessary for him to read but one. (Rec., p. 54.) This was prior to the 1st of July, 1899. Then the contracts were filled up by the Commissioner, omitting signatures, and forwarded to the several parties who had signified their willingness to sign the contracts for the next year. (Rec., p. 51.) Mr. Johnson does not know certainly that the Commissioner read the contracts, but testifies as follows:

> I think he did. I went over the matter with him and conferred about the terms and conditions, as I did about official business of that importance at all times. (Rec., p. 51.)

And on cross-examination:

> Cross-question. Now, Mr. Johnson, you say that after you drew up this contract—that is, the blank form of contract—you presented it to the Commissioner of Internal Revenue before execution?
>
> Answer. Yes.
>
> Cross-question. You say you don't know whether he read it or not? Do you recollect distinctly whether he did read the contract or not, or did he accept your statement in regard to it?
>
> Answer. I don't recollect whether he actually read the contract. I was impressed with the idea that he did.

Cross-question. He did read the whole contract?

Answer. I was impressed with the idea that he did. He was a careful business man, and usually in matters of that kind he would run over things which I did, either with me or by his comparing it or reading it himself.

Cross-question. You say he left the preparation of that contract to you?

Answer. The drafting of the contract; yes.

Cross-question. And when you submitted it to him do you recollect what you said to him? You don't know whether he read the contract or not, do you?

Answer. I do not. (Rec., pp. 53–54.)

He also testifies that the business was very important business; that it was considered in the office an important matter to have the compensation for imprinting made uniform; also that it was considered a matter of importance to have the salaries for supervision increased. (Rec., p. 55.) And yet, in the face of this tesimony, counsel for appellee asserts in his brief (p. 13): "It appears by appellant's testimony that the Commissioner did not read the contract before signing it, but also relied upon Mr. Johnson." Certainly the presumption is irresistible in a matter of this weight, where the Commissioner had determined upon important specific changes in the new contracts, that when the blanks for the new contracts were submitted to him he read them over to see that they were drawn in accordance with his wishes in the matter,

and especially as to the changes which he had determined upon. So that even if the claimant were correct in its unfounded contention that the Commissioner, on April 25, 1899, intended to put into the new contracts provisions which on June 19 of the same year he omitted, nevertheless the evidence shows clearly that at the time the contracts were approved by him he knew what they contained and that they contained all the new provisions that he desired or intended they should.

As against this evidence that the Commissioner was perfectly well aware of the contents of the contract with the claimant, claimant's counsel made the general assertion in his brief in the court below, and has so contended in this court, that the Commissioner and the Secretary of the Treasury admitted to him that the agreement with the claimant was that contained in the letter of April 25, 1899; also that the claimant's claim of mistake and breach of contract had been made continuously and always freely admitted.

The only evidence which in any way tends to bear out these statements is to be found in the testimony of David Milliken, president of the claimant, to the effect that after he had signed the new contract in behalf of the claimant (without knowing its contents), he was informed that a contract to do the same work had been granted to the American Imprinting Company, which company he knew had not had a prior contract with the Government for imprinting stamps; that he then, for the first time, read his contract and

found that it did not contain provision that no application would be received after the 25th day of May, 1899, nor from any person who did not have a prior contract for imprinting stamps with the Government; that he at once went to Washington and had an interview with Secretary Gage, who admitted that the letter of April 25, 1899, contained the agreement, and stated that the contract with the American Imprinting Company had been granted through inadvertence; that he had frequent subsequent interviews with the Secretary of the Treasury, who at all times freely and frankly admitted that the contract with the American Imprinting Company was in violation of the contract made with claimant. (Rec., p. 43.) He also states that in an interview which he had with the Commissioner of Internal Revenue on or about the 25th day of May, 1899, when he delivered his reply to the circular letter of the Commissioner (Rec., p. 8), the Commissioner asked if he was going to make an application for the renewal of his contract, and he answered yes, but not until the time approached, 12 o'clock, the time for closing; that he did not want to take chances of any applications being put in by persons who did not have a contract on the 25th day of April, 1899; but the Commissioner assured him no such applications would be received.

This is the sum total of the evidence that has any relation whatever to these allegations regarding admissions made by the Secretary of the Treasury and the Commissioner of Internal Revenue. It was all given under objection and was clearly inadmissible.

As regards the Secretary of the Treasury, it is inadmissible because hearsay evidence. Secretary Gage was at the time living in New York City, the home of claimant's counsel, and his testimony could undoubtedly have been obtained. Furthermore, this testimony as to admissions by the Secretary is immaterial, since the Secretary was in no sense authorized to make any such admissions, not being the party who made the contract and having had no relation to the contract so far as is shown by the contract itself (Rec., pp. 3–6), which is the best evidence. As for the Commissioner, there is not a word in this testimony which even indirectly amounts to any of the admissions asserted by claimant's counsel. Finally, neither the Secretary nor the Commissioner, as agents of the United States, had authority to make any such admissions, and this the claimant was bound to know.

But reliance is also made upon certain alleged statements made to Mr. Milliken by Mr. Johnson, chief of the stamp division, regarding the changes in the contract. The testimony on this point is as follows:

> I was informed by the Commissioner that my application was accepted and my contract would be renewed. I then called upon Mr. Johnson, chief of the stamp division of the Bureau of Internal Revenue, and informed him that my contract had been renewed. He then delivered to me two copies in blank of the contract to be executed. Whereupon I said: "I presume the only changes

from the other contract are those contained in the letter or communication dated April 25, 1899?" And he said: "That is all." Whereupon I took the contracts away to New York, and subsequently executed them without reading them. (Rec., p. 43.)

Cross-question. Did Mr. Johnson, in the conversation you speak of regarding the provisions of this second contract, say that it contained anything in reference to the date when applications would be received, or anything in reference to the fact that the contracts were only going to be made with the present contractors?

Answer. He made no specific reference to anything. I asked the question of him: "What does this contract contain; just the changes made necessary by that letter?" And he said: "That is all." There was no distinctive reference to anything at all. (Rec., p. 50.)

Mr. Johnson's testimony on this point is that so far as he knew there was no intention of putting into the contract the provisions which claimant contends were omitted, and further as follows:

Question. Do you remember Mr. Milliken's question as to what was contained in the contract as he has testified about, to you and addressed to you?

Answer. I remember several conversations with Mr. Milliken about the contracts and the method of doing the business, but I have no distinct recollection of the specific matter alleged being discussed in the conversation he refers to.

Question. Did you make any statement to him regarding the contents of this second contract by which you intended to have him rely upon that statement as to such contents solely?

Answer. I did not. The letters and correspondence about the contracts speak for themselves. I presented no extraneous matters, so far as I am advised, except in the conversation about the method, or something of that kind.

Question. Did you at any time make a statement to him regarding the contents of this intended contract, which you intended he should rely on to the exclusion of his finding out himself what was in the contract?

Answer. I did not.

Question. He says that he asked you if it contained the changes referred to in the circular letter, and that you stated it did, and that was the only change. Assuming that his recollection as to that is correct, had you any intention of assuring him that the contract contained statements as to the date when applications would be received and that contracts would be let only to present contractors?

Answer. I did not.

Question. As a matter of fact, it did not contain, as you already testified, any such statements?

Answer. It did not contain any such statements.

* * * * *

Cross-question. Now, at the interview that I mentioned that I had with you, regarding the contents of the contract, there was no intention on my part to mean or say that you misled me

in any way at all; but the question put by Mr. Pradt rather assumed that. Do you recall any conversation that I had with you about that time, on the 25th day of May, after my contract had been awarded to me; or, let me put it this way: Do you recall any conversation, as I have related, in which I stated, or I had asked you, if the new contracts contained anything but the changes provided for or mentioned in the letter of April 25? Do you recall any such conversation as that?

Answer. I recollect a number of conversations you had with me at different times affecting this contract and this work, but I don't recollect any conversation in which the language used by you, or the answer assumed by me, was made or given.

Cross-question. Are you prepared to state that no such conversation may not have been had?

Answer. I am not.

* * * * *

Redirect question. Were you, at the time of the conversations that you had with Mr. Milliken, that he has referred to, authorized in any way, by virtue of the duties of your official position, to make statements to intending contractors as to what the contracts they were going to sign contained, for the purpose of having them rely solely upon what your understanding was of the contents of those contracts?

A. I was not.

Q. Had you any intention of assuming to do anything of that sort?

Answer. I had not. (Rec., pp. 52–54.)

The effect of the testimony regarding the conversation Mr. Milliken had with Mr. Johnson, upon which the claimant relies, is, at the most, that Milliken and Johnson were talking at cross-purposes, Johnson having in mind only those changes which, pursuant to the directions of the Commissioner, he had put into the draft of the new contract, and Milliken having in mind other provisions which he says he supposed it was also intended should be added to the contract; so that Milliken's understanding of Johnson's response was in part an absolute misunderstanding. He does not say that Johnson stated that those provisions were in the new contract, but that he interpreted his answer to mean that; whilst Johnson says he did not intend to convey any such impression, since, as a matter of fact, he knew that the contract *did not* contain those provisions. Add to this the fact that it was the Commissioner and not Johnson with whom the claimant was dealing, and who executed the contract on the part of the defendant; that Johnson had no authority whatever to make any statement respecting the contents of the contract upon which the claimant had any right to rely, and that he had no intention of assuming any such authority, nor of making any such assertion; that the claimant was bound to know this, and that no reason is shown by claimant for making any such inquiries of him—and the sum total of this interview is that Milliken most illadvisedly chose to inform himself as to the contents of a written contract, which he then held in his hand and had but to read, to know exactly,

by questioning a subordinate in the Commissioner's office, without authorty in the premises, in such a way as to totally and inexcusably misconceive the purport of the reply to his question.

The whole evidence, then, establishes clearly that the Commissioner of Internal Revenue, who represented the United States in the execution of this contract, had no intention at any time of putting into the contract the provisions which the claimant says he understood were to be included therein, and that the blank contract which that official caused to be drawn up and printed for the use of all contractors for imprinting stamps contained all that he intended it should contain without omission of any provision which he had at any time intended to include in the same or which he had any intimation that any contractor expected would be included in it. That the provisions which the claimant alleges should have been inserted in the contract were not inherently of such character as properly to be made a part of the contract, but were simply a notification to the various prior contractors of the policy which the Commissioner had decided to pursue with respect to granting new contracts, just as other portions of his letter of April 25, 1899, were mere directions to applicants for contracts respecting the method of making such applications. Finally, on this subject it seems fair to say that Mr. David Milliken, the representative of the claimant, did not at the time he made application for a new contract nor when he received the blanks in duplicate from Mr.

Johnson, have any real impression or belief that that contract contained or was intended to contain the provisions which he now contends it should contain. This conclusion is not only natural and reasonable, but is evidenced by the application itself and by Mr. Milliken's own testimony, very lamely qualified afterward, that he did not mention those things in that application because he did not consider them "relating directly to the subject-matter of the contract." Obviously that was the only sensible view that anyone could have of the matter.

No doubt Mr. Milliken then believed and had reason to believe that the Commissioner would confine the letting of new contracts to the old contractors, but it is reasonable to say that such belief could not and did not extend to the supposition that this declared policy of the Commissioner would or could be expressed in the contract itself.

NO PRELIMINARY AGREEMENT.

The cases cited by claimant's counsel to support the proposition that in a suit to re-form a written contract evidence of the true contract may be found in a preliminary agreement, present in every instance an absolutely different state of facts than in this case.

In the case of *Hearne* v. *Marine Insurance Co.* (20 Wall., 488) there was a plain preliminary agreement consisting of a request for insurance on terms specified, and a reply stating that the policy would issue accordingly, and reciting the voyage it would cover.

A similar state of facts obtained in the case of *Equitable Insurance Co.* v. *Hearne* (20 Wall., 494). The same is true also of the case of *Harvey* v. *United States* (105 U. S., 671), and of all the various other cases cited by claimant. In *Garfielde* v. *United States* (93 U. S., 242) the *only contract* between the parties was contained in the notice, proposal, and acceptance.

In this case, as has been already pointed out, there was nothing like any preliminary agreement between the parties, but simply a notification by the Commissioner to parties contemplating making applications for contracts, and in reply thereto an application by the claimant for such contract, which was accepted by the Commissioner. But this did not constitute a contract. Neither party was bound to anything. If the claimant had subsequently decided that it did not care to execute a new contract, what remedy would the Commissioner have had? And if the Commissioner, in the exercise of that unqualified discretion reserved by him in his circular letter of April 25, 1899, had concluded that after all it was not advisable to let the claimant have a new contract, what remedy would it have had? Clearly no new contract of any sort was entered into until the contract of June 19, 1899, was executed by both parties.

Moreover, fairly construed, this so-called contract is a mere permit or license from the United States authorizing the claimant to print revenue stamps

under certain restrictions intended to protect the Government from fraud, but binding the United States to nothing whatsoever. Indeed, it was expressly stated in the "contract" that the claimant must look for his full compensation for such printing to the persons who might employ him to print stamps. Nor did the claimant agree to print stamps for the Government, but for the public. (Rec., p. 4.)

NEGLIGENCE OF CLAIMANT.

If anything more were needed to absolutely dispose of the claim of mistake made in this case it is to be found in the gross and absolutely inexcusable negligence of the claimant, through the action of its president and representative, David Milliken, jr., in failing to read the contract before he executed the same on behalf of the claimant. This negligence is all the more inexcusable and indefensible when it is remembered that Mr. Milliken was not acting in his own behalf, nor even in behalf of the former copartnership, but of a corporation, which corporation had intrusted to him the duty of applying for and executing an important contract with the Commissioner of Internal Revenue. Mr. Milliken knew that the contract was to contain two additional provisions of much importance to the claimant. He says he also supposed that it was to contain other provisions, which the claimant now asserts were of still greater importance to it. Indeed, he testifies that he would not have executed the contract at all if he had known that it did not contain a provision that no similar contracts would be entered

into with parties who had not held a contract for imprinting stamps during the prior year. And yet, with the printed contract in his hand, requiring only a few minutes of his time to ascertain whether the contract contained this absolutely vital provision, and whether its provision for an increase in the cost of supervision was the $900 which the Commissioner had announced in his letter, or more or less than that sum, and whether or not the contract provided for a uniform basis of prices for imprinting stamps, the absence of which provision in the former contract had resulted in net loss instead of profit to his firm under its prior contract, he, with the most extraordinarily careless and unbusinesslike neglect of a simple and obvious duty resting upon him not only personally but in behalf of the corporation which he represented, failed to perform this plain duty and chose rather to attempt to inform himself respecting the contents of the contract by questions respecting it addressed to a person who was not empowered to reply to such questions with authority and whom he had no reason to suppose to be so authorized. Such negligence is alone sufficient to preclude the claimant from setting up this claim of mistake. In a very similar case this court recently said: "A spark of intelligence on the part of the assured would prompt him to refer to his policy." (*Nederland Life Ins. Co.* v. *Meinert*, 199 U. S., 179.)

In *Glenn* v. *Statler* (42 Iowa, p. 110), a bond was delivered to W. to sign as surety, who did so without reading it, being told that it was a delivery bond. It

turned out, however, to be otherwise. Held, that his gross negligence precluded him from relief on the ground of mistake, citing Story's Eq. Jur., sec. 146, as follows:

> It is not, however, sufficient in all cases to give the party relief that the fact is material, but it must be such as he could not by reasonable diligence get knowledge of when he was put upon inquiry. For if by such reasonable diligence he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence.

The general principal regarding such negligence is also defined by Story as follows:

> Courts of equity do not sit for the purpose of relieving parties under ordinary circumstances who refuse to exercise a reasonable diligence or discretion. (1 Story Eq. Jur., 13th ed., p. 226.)
>
> But relief is not even given in equity in cases of mistake falling within its rules when the party seeking it could by reasonable diligence have discovered the fact which caused the injury. (*Butman* v. *Hussey*, 30 Me., p. 266.)

The rule is the same even where misrepresentation is relied upon as a ground for relief.

> The rule being in such case that a misrepresentation, in order to affect the validity of a contract, must relate to some matter of inducement to the making of the contract in which, from the relative position of the parties and their means of information, the one must

> necessarily be presumed to contract upon the faith and trust which he reposes in the representations of the other on the subject of the contract; for, if the means of information are alike accessible to both, so that, with ordinary prudence or diligence, the parties might, respectively, rely upon their own judgment, they must be presumed to have done so; or, if they have not so informed themselves, must abide the consequences of their own inattention and carelessness.
>
> *Hill* v. *Bush*, 19 Ark., 528.
>
> *Juzan* v. *Toulmin*, 9 Ala., 684.

But in this case the claimant expressly disclaimed any imputation of deceit. (Rec., p. 53, Cross-q. 8.)

The decisions in this connection relied upon by the claimant are in no way parallel to this case.

In *Palmer* v. *Hartford Insurance Co.* (54 Conn., 488), the facts are stated in the syllabus as follows:

> The plaintiffs had held a policy of insurance of the defendants upon a quantity of merchandise, and upon the policy expiring applied to the defendants for a renewal policy, to be on the same terms with the expiring one, which the defendants promised to give. The defendants wrote and delivered to them a new policy and received the premium. The plaintiffs, supposing it to be on the same terms with the first, did not examine it until after the loss of the property by fire three months later, when, on reading it, they discovered an important variance from the former policy, materially affecting their right of recovery. If they had

> known of the change they would not have accepted the policy. In a suit for the reformation of the policy and a recovery of what would become due under it, it was held that the plaintiffs could not be held to be guilty of laches in not examining the policy and applying earlier for its correction, since they had a right to believe it to be in all essential respects like the former one.

In this case the claimant knew that the new contract was to be different from the old one in essential and important particulars, and says that it supposed that it also contained a provision which the claimant deemed vital and paramount. It was, therefore, its plain duty to make certain that the contract contained these provisions, and it has furnished no reasonable excuse for its neglect to do so.

In *West* v. *Suda* (69 Conn., p. 60) the plaintiff failed to read a written contract a second time before execution, in order to verify erasures made in his presence and at his dictation, and it was held that this did not as a matter of law preclude him from obtaining a reformation of the contract, it having been found that the mistake *was not due to his neglect* but to the error of the scrivener in making the erasures.

The facts thus detailed are clearly not even remotely similar to the facts in this case. The court in that case states the law as follows:

> The rule of law that no one shall be allowed to escape his contract obligations by saying he did not read what he signed is a most wholesome and necessary rule, but as applied to the

> fact of mistake it is a rule of evidence. A failure to read is not always conclusive of negligence. For obvious reasons it is not conclusive in this case. The rule did not bar the trial court from finding that the mistake was not due to the negligence of the plaintiffs (p. 62).

On the contrary, in this case it is impossible for the court to reach any other conclusion than that the mistake, if there was any, was due to the negligence of the claimant.

ONE-SIDED MISTAKE.

The most, then, that the evidence establishes in this case is the mistake of the claimant alone—a one-sided mistake, which is not ground for reforming a contract. (*Hearne* v. *Marine Insurance Co.*, 20 Wall., p. 491.)

NO DAMAGES SHOWN FOR WHICH THE DEFENDANT IS LIABLE.

Tested by the rule of law applicable the claimant in no event is entitled to damages for loss of profits as claimed by it in this case. That rule is that where there is a breach of a contract the party in fault may be made liable for the profits which might have been realized by performance, but such profits must be the direct fruit of the contract, and not too remote or speculative. (*United States* v. *Behan*, 110 U. S., 344.)

> It is a well-established rule of the common law that the damages to be recovered for a breach of contract must be shown with certainty, and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damages in such

cases, and not because there is anything in their nature which would *per se* prevent their allowance. Profits which would certainly have been realized but for defendant's default are recoverable. Those which are speculative or contingent are not. (*Griffin* v. *Colver*, 16 N. Y., 491.)

The general rule is that the party injured is entitled to recover all of his damages, including gians prevented as well as losses sustained, but this rule is subject always to two conditions: First, that the damages should be such as must have been fairly in the contemplation of the parties to the contract at the time it was made; and, second, they must be certain, not only in their nature, but as respects the cause from which they proceed, for the law wise y adopts that mode of estimating damages that is most definite and certain. * * * The grounds upon which is founded the general rule excluding profits in estimating damages are: (1) That n the greater number of cases such profits are too dependent on numerous and changing contingencies to constitute a definite and trustworthy measure of damages; (2) because such loss of profits is ord narily remote and not the direct and immediate result of the nonfulfillment of the contract; (3) the engagement to pay such loss of profits in case of default of performance does not form a part of the contract, nor can it be said from its nature in terms that it was within the contemplation of the parties. (*Witherbee* v. *Meyer* 155 N. Y., pp. 449, 453.)

In the case of *Whorley* v. *Tennessee Centennial Exposition Company* (32 S. W., 346), especially relied upon by the claimant, the defendant had contracted to allow the plaintiff the exclusive sale of cigars, etc., within its grounds, and had violated that contract by permitting others than the plaintiff to sell cigars upon its grounds. The court held that the profits, as nearly as could be ascertained, from these sales, permitted by the defendant in violation of its contract, could be recovered by the plaintiff.

In the present case, however, the claimant has given no evidence whatever of a loss of profits which is the direct result of any breach of the contract of the defendant, assuming for the sake of argument that that contract is to be read as contended for by the claimant, for an examination of the contract shows that, as already pointed out, the defendant made no stipulation whatever as to the amount of work that the claimant might perform. In that respect the agreement is purely unilateral, the claimant agreeing to do such printing of that character as might be offered for the purpose by the public. But even this is qualified by the condition that no stamps shall be imprinted except upon the requisition of the Commissioner or a collector of internal revenue or authorized agent of the Government. So that it is plain that the United States placed itself through this contract under no obligation whatever regarding the volume of work to be done by the claimant, but expressly reserved to itself the right to control through

its agents whatever work was brought to the claimant by the public. As already said, the United States simply granted a license to the claimant to imprint revenue stamps. Not only this, it reserved the right to cancel the contract at any time. Accordingly the action of the Commissioner in entering into the contract with the American Imprinting Company, complained of by the claimant, was not a giving to that company of work which it had been agreed should go to the claimant, since no agreement whatever of that kind had been made by the United States. The most that can be claimed by the claimant is that the *indirect* result of the granting of the contract with the American Imprinting Company was to deprive the claimant of work which *might* have come to it; whilst the amount of such contingent work rests in absolute vagueness and uncertainty, as shown by claimant's own testimony.

For example, Hersey Brown testifies that, the conditions remaining the same, his firm would have been likely to send their work to the claimant if the American Imprinting Company had not been formed. (Rec., p. 21.)

William Badeau makes a similar statement, on the condition that the work of claimant had continued to be satisfactory. (Rec., p. 24.)

Samuel Williams *presumes* the same. (Rec., p. 39.)

All of the various witnesses called to prove the amount of stamps printed by the American Imprinting Company during the fiscal year 1900 testify that

their respective firms or corporations were interested as stockholders in the American Imprinting Company and derived profits from its business, and therefore it was to their interest (and they acted accordingly) to get all the business possible for that company. This, of course, would not have been the case if they had had their work done by a stranger company like the claimant. So the amount of work which they might have given the claimant if the American Imprinting Company had not been formed is necessarily a matter of guesswork.

It is clear then that the plaintiff's claim for lost profits can not possibly be sustained, being profits too remote, speculative, and uncertain, and because they are not directly contemplated in the contract.

It is insisted by the United States, not only that this case should have been dismissed for want of jurisdiction, but that no claim of any sort was shown against the Government, and therefore the judgment of the Court of Claims should be reversed.

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